No. 09-1299

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In the
Supreme Court of the United States

DONNIE CLEVELAND LANCE,

PETITIONER,

v.

HILTON HALL, WARDEN,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Donnie Cleveland Lance respectfully requests that the Court grant rehearing and enter an order (1) vacating its denial of the petition for writ of certiorari, entered on June 28, 2010, and (2) granting the petition. For reasons set forth below, rehearing is warranted in light of this Court's recent per curiam decision in *Sears v. Upton*, No. 09-8854, 2010 WL 2571856 (U.S. June 29, 2010), granting certiorari to the Supreme Court of Georgia. This Court issued *Sears* on June 29, 2010, one day after the Court denied certiorari in this case.

Sears makes clear that when trial counsel's investigation into mitigation evidence at the penalty phase of trial is constitutionally inadequate, the habeas court must undertake a "probing," "fact-intensive" inquiry to determine whether counsel's deficient performance prejudiced the defendant. *Sears* cannot be reconciled with this case. Here, the Georgia habeas court undertook precisely the probative, fact-intensive inquiry that this Court's precedents mandate and granted habeas relief after making careful fact findings based on its first-hand consideration of evidence and live testimony, only to have the Georgia Supreme Court brush aside its factual determinations and, reinterpreting the cold record, conjure up its own appellate fact findings as a basis for concluding that counsel's deficient performance was not prejudicial "as a matter of law."

For reasons explained below, the Georgia Supreme Court's decision cannot be reconciled with the fundamental principles that *Sears* recognizes

and reaffirms. Accordingly, because it appears that this Court may not have fully appreciated the close similarities between *Sears* and this case, petitioner respectfully seeks rehearing.

In addition, rehearing is warranted to avoid unnecessary confusion among the lower courts and to ensure that this Court's remand in *Sears* is not rendered a meaningless exercise for which the outcome is preordained. The Court's decision in *Sears* does not prejudge the result of the remand, but it necessarily recognizes that the Georgia habeas court, after undertaking the appropriate inquiry, might find that counsel's failure to conduct an adequate mitigation investigation prejudiced Sears. If the Georgia Supreme Court's decision below is not corrected, however, the result of the remand in *Sears* is all but assured and this Court's decision is nothing more than an advisory opinion requiring a costly round of unnecessary further proceedings.

The Georgia Supreme Court concluded in this case that, *as a matter of law*, petitioner was not prejudiced by his counsel's constitutionally inadequate mitigation investigation because the evidence of petitioner's borderline mental retardation, organic brain damage, dementia, alcohol abuse, and depression would have no reasonable probability of changing at least one juror's mind about imposing the death sentence. App. 14a. Accordingly, because the mitigating evidence in *Sears* is on its face much weaker and the aggravating evidence arguably stronger than the evidence in this case, if the Georgia Supreme Court's decision below is left standing, it is hard to fathom how the habeas court on remand in *Sears* would not

be required to deny relief as a matter of law. Instead of putting the habeas court in that untenable position, with conflicting directives from this Court and the Georgia Supreme Court, the Court should grant review in this case and take steps to ensure that its mandate in *Sears* is faithfully and meaningfully applied.

I. The Court Should Grant Rehearing In Light Of Its Subsequent Decision In *Sears v. Upton*.

On June 29, 2010, following its order denying certiorari in this case, the Court granted certiorari in *Sears v. Upton*, No. 09-8854, 2010 WL 2571856 (U.S. June 29, 2010). In *Sears*, the Court addressed virtually identical questions to those presented in Mr. Lance's petition—namely, how should courts apply the prejudice standard for evaluating Sixth Amendment claims when the performance of counsel's mitigation investigation at the penalty phase of trial is constitutionally inadequate. In reaffirming that the prejudice inquiry requires a "probing" and "fact-specific" analysis, *Sears* reached a conclusion directly at odds with the Georgia Supreme Court's decision in this case. If this case had been decided one day after *Sears*, rather than the other way around, *Sears* would have controlled.

1. In *Sears*, a Georgia jury sentenced the defendant to death for a brutal rape-murder. Sears kidnapped a 59-year old mother from a supermarket parking lot, punched her in the face with brass knuckles, handcuffed her in the back of a car, drove her across state lines, raped her, and then forced her into the woods where he stabbed her in the neck until she died. *See Sears*, 2010 WL 2571856, at *12

(Scalia, J., dissenting). In light of these "horrendous acts," it was important for trial counsel to conduct an adequate mitigation investigation in an attempt to convince the jury not to impose a sentence of death.

During the penalty phase of trial, Sears' counsel "presented a reasonable mitigation theory and offered evidence sufficient to support it." *Id.* at *10 (Scalia, J., dissenting). That evidence was aimed at convincing the jury that Sears grew up in a stable and loving environment, and that a death sentence would devastate his family. *Id.* at *3. Because they did not complete an adequate investigation, however, Sears' counsel were unaware of mitigation evidence that could have affected the jury's sentence. As the Court's decision recounts, mitigation evidence emerged during the post-conviction proceedings showing that Sears "suffers from substantial cognitive impairments," *id.* at *4, as a result of "hitting his head at a roller-skating rink," "running into an end table as a child," and "getting hit with a golf club sometime later in elementary school." *Id.* at *11 (Scalia, J., dissenting). Other evidence not considered by the jury showed that Sears grew up in an abusive family, was learning disabled, and suffered from drug and alcohol abuse in his teens. *Id.* at *2, 4.

In the state habeas proceedings, Sears argued that his trial counsel rendered ineffective assistance in failing to develop mitigation evidence concerning his mental capacity and family background, and that the mitigating evidence was sufficiently compelling to undermine confidence in the jury's sentence. The state post-conviction court denied

habeas relief. It found that, although trial counsel's performance was constitutionally deficient, because trial counsel had presented a different mitigation theory to the jury, it was "not possible to know what effect a *different* mitigation theory would have had." *Id.* at *10 (Scalia, J., dissenting) (emphasis in original). The habeas court concluded that Sears had not demonstrated prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and was, therefore, not entitled to post-conviction relief.

2. After the Georgia Supreme Court summarily denied review, Sears filed a petition for review with this Court. The Court granted that petition on June 29, 2010, vacated the lower court's judgment, and remanded for further proceedings. In a per curiam opinion, the Court reaffirmed and clarified the prejudice standard that, in "all circumstances," courts must apply when evaluating "a claim of ineffective representation in the context of a penalty phase mitigation investigation." *Sears*, 2010 WL 2571856, at *8.

The Court held that, although the state habeas court appeared "to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances" of *Sears'* case. *Id.* at *6. The Court explained that the "*Strickland* inquiry requires" a "*probing* and *fact-specific analysis*." *Id.* at *8 (emphasis added). Noting that this Court has consistently and "categorically rejected" the type of "truncated" approach taken by the habeas court, the Court reaffirmed that, in "all circumstances," a "probing inquiry" is the "proper prejudice standard for evaluating a claim of ineffective representation in

the context of a penalty phase mitigation investigation." *Id.*

The Court remanded for the habeas court to undertake a proper analysis of prejudice under *Strickland*. That analysis, the Court explained, must take "into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments ... to assess whether there is a reasonable probability that Sears would have received a different sentence" had the jury been able to consider the evidence. *Id.* Although the recent evidence, described in detail in Justice Scalia's dissent, could reasonably be construed as supporting the habeas court's ultimate conclusion—*i.e.*, that the available mitigation evidence would not "have persuaded a jury to change its mind about the death sentence for this brutal rape-murder," *id.* at *9 (Scalia, J., dissenting)—the majority decision rejected any suggestion that facts could be "found" on appeal. Instead, the Court concluded that "it is for the state court," and not an appellate court, to undertake the required analysis "in the first instance." *Id.* at *8–9.

3. The Court's decision in *Sears* confirms that the Supreme Court of Georgia in this case has radically departed from precedent and that its decision should not be allowed to stand. In this case, unlike in *Sears*, the state habeas court conducted precisely the type of probing, fact-intensive analysis called for under this Court's controlling decisions. In a painstaking review of the evidence presented during the post-conviction proceedings, the habeas court found that, "in light of the strength of the mental health evidence offered at the habeas

hearing," there was a reasonable probability that, but for trial counsel's deficient performance, the outcome of the penalty phase of trial would have been different. App. 101a.

The specific factual findings made by the habeas court confirm that the mitigation evidence in this case was much stronger than the evidence in *Sears*. As the habeas court found, "all of the mental health experts, including those employed by the Respondent, testified that" Mr. Lance suffers "from mental impairments that render [him] borderline mentally retarded." App. 97a. The evidence recounted by the habeas court include testimony from well-credentialed experts that Mr. Lance has "brain damage [frontal lobe damage] as a result of traumatic brain injury or the addictive effects of alcohol abuse"; has been "treated for depression and anxiety"; satisfies the criteria for dementia due to head injuries and chronic alcohol abuse; and has an IQ of 78, placing him in the "borderline range of intellectual abilities." App. 97a–98a (alteration in original). As the experts testified, and as the habeas court found, Mr. Lance's "neuropsychiatric impairments" would have "significant implications" for his "behavior at the time of the murders." App. 98a.

Unlike in *Sears*, Mr. Lance's counsel presented no reasonable mitigation theory and offered no evidence in mitigation at the penalty phase of trial, including what the trial court found to be "easily obtainable psychiatric mitigating evidence." App. 90a. Moreover, unlike in *Sears*, the readily available evidence of Mr. Lance's "significant mental impairments" was solid and credible. *Cf. Sears*,

2010 WL 2571856, at *11 (Scalia, J., dissenting). As the trial court explained, it was well known to his friends and family that Mr. Lance had been "shot in the head" and that, because he fled the hospital against his doctor's orders, this head wound was never properly treated. App. 94a. The evidence further showed that Mr. Lance suffered "terrible" and recurring headaches, was hospitalized "for mental health treatment," had a "longstanding drinking problem," regularly "experienced dizziness" that made it difficult for him to work, and was "often involved in wrecks while racing cars," but "rarely, if ever, sought medical care following these wrecks." *Id.*; *see also* App. 6a–7a (noting that Mr. Lance had been exposed to "toxic fumes," ingested "gasoline as a child" and had "temporarily stopped breathing," and was depressed). The trial court found that all of this evidence was readily available from Mr. Lance's "family" and "friends" and from "other members of the small-town community" in which Mr. Lance lived, but none of it was offered in mitigation at sentencing. App. 94a.

4. Although the state habeas trial court, based on its own findings of fact, determined that habeas relief was warranted, the Georgia Supreme Court reversed. The Georgia Supreme Court did not purport to show that any of the habeas court's factual findings were "clearly erroneous." App. 4a (acknowledging that habeas court's factual findings are reviewed for clear error). It instead merely concluded that, "as a matter of law," the habeas court's prejudice determination was wrong because, in its view, the available mitigation evidence "would not in reasonable probability have changed the outcome of the sentencing phase if it had been

presented" to the jury. App. 14a. Moreover, according to the Georgia Supreme Court, and contrary to the habeas court's findings, it is unlikely that trial counsel would have been informed of any significant neurological deficits that would have justified further investigation. App. 8a.

But, significantly, these "legal" conclusions are not based on any "facts" found by the habeas court. Instead, the Georgia Supreme Court brushed aside the habeas court's careful fact findings and based its decision on its own reinterpretation of the record evidence. According to the Georgia Supreme Court, Mr. Lance's neurological deficiencies are "mild," *id.*, and Mr. Lance suffers only from "moderate slowness." App. 9a. Notwithstanding the substantial contradictory evidence presented at the habeas hearing, in the Georgia Supreme Court's view the evidence "showed merely" that Mr. Lance "functioned, when sober, in the lower range of normal intelligence," had "some memory problems," suffered "some depression," had "some difficulty in planning and problem solving," and "might have been somewhat impulsive." App. 13a. The Georgia Supreme Court thus concluded that Mr. Lance was not prejudiced by his counsel's deficient performance: "Given Lance's long history of contemplating the murder[s], ... the manner in which he finally carried out [the] murders," and "his utter disregard" for the "suffering and deaths" of his two victims afterward, "we conclude that the new evidence of Lance's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the

sentencing phase if it had been presented at Lance's trial." App. 14a.

5. The Georgia Supreme Court's recasting of the record evidence and made-up appellate fact-findings are not supported by the totality of mitigation evidence presented to the state habeas court. But, more significantly, the approach taken by the Georgia Supreme Court is directly at odds with *Sears* and this Court's other precedents. *See* Pet. 16–21 (showing how the Georgia Supreme Court's decision conflicts with this Court's decisions in *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Williams v. Taylor*, 529 U.S. 362 (2000)).

The whole point of *Sears* is to require the state habeas court to engage in a fact-intensive inquiry to determine whether there is a reasonable probability that available mitigation evidence would have affected the jury's death sentence. The process that *Sears* contemplates is only meaningful if the habeas court's factual findings, unless shown to be clearly erroneous, are entitled to appropriate deference on appeal. It makes no sense to require habeas courts to engage in a probing, fact-intensive inquiry if whatever factual findings and conclusions they reach after holding an evidentiary hearing are second-guessed and brushed aside by appellate courts. If that were permissible, there would have been no reason to remand in *Sears*. This Court is just as capable as the Georgia Supreme Court of drawing conclusions from the cold record and engaging in appellate fact-finding.

II. The Court Should Grant Rehearing To Ensure That The Remand In *Sears* Is Not Rendered Meaningless.

Rehearing is also warranted to avoid confusion within the lower courts in Georgia as to the binding force of this Court's precedents. Unless the Court grants rehearing, the combination of its decision in *Sears* and its denial of certiorari in this case, leaves Georgia habeas courts in a hopelessly confused situation. Under this Court's precedents, as reflected in *Sears*, when confronted with a Sixth Amendment claim, Georgia courts are required to engage in a probative, fact-intensive inquiry to determine whether counsel's deficient performance was prejudicial. Under the controlling Georgia Supreme Court precedent in this case, however, any fact-findings resulting from that inquiry become irrelevant because, *as a matter of law*, exactly the type of mitigation evidence that this Court reaffirmed in *Sears* as relevant to a jury's sentencing decision is to be disregarded in any capital case where the murder can be characterized as heinous and the defendant shows "utter disregard" for the suffering and death of his victims.

This concern is especially relevant in *Sears* itself. Even construed in the most favorable light, it appears that the mitigation evidence in *Sears* is much weaker than the mitigation evidence available in this case. As Justice Scalia's dissent shows, no matter what findings are ultimately made by the state habeas court on remand, it would be possible to interpret the record on appeal to characterize the mitigation evidence in *Sears* as weak and unconvincing. *Sears*, 2010 WL 2571856, at *10–12

(Scalia, J., dissenting). Regardless of what the state habeas court might find on remand, Sears could be said to suffer from "mild" neurological deficiencies and "moderate slowness." App. 9a. It is also possible to show that the aggravating circumstances of Sears' crime are at least as heinous as those of petitioner's. *See id.* at *12 (Scalia, J., dissenting). Accordingly, unless the Georgia Supreme Court's decision in this case is corrected, the outcome of the remand in *Sears* is a foregone conclusion. No matter what fact findings are made by the habeas court, the Georgia Supreme Court will hold that, as a matter of law, Sears is not entitled to habeas relief. *Cf. NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (express concern when remands are an "idle and useless formality").

Accordingly, to ensure that this Court's remand in *Sears* is not a meaningless formality, the Court should vacate its order denying the petition. It should then grant the petition and either summarily reverse the Georgia Supreme Court's decision below or undertake plenary review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, the Court should grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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